IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.829 OF 2006
ALONGWITH
CIVIL APPLICATION NO.863 OF 2007

Bapu Rama Mulik & Anr. ....Appellants

V/s.

Sou. Indibai Baburao Patil & Ors. ....Respondents

Mr.Amit Borkar for Appellants.
None for Respondents.

CORAM : V.M. KANADE, J.

DATED : 16th JULY, 2007.

P.C:-

1. Heard learned counsel for the Appellants.

2. Appellants take exception to the order passed by the Joint Civil Judge, Junior Division, Islampur, whereby suit filed by the Respondent No.1/Plaintiff for partition and separate possession of share in the suit properties was partly decreed and this order was confirmed by the Lower Appellate Court.

3. Learned counsel for the Appellants submits that both the court below had erred in coming to the conclusion that the Respondent No.1./Plaintiff was entitled to file suit for partition particularly when father

of plaintiff had expired in the year 1953 prior to the Hindu Succession Act coming into force. This submission can not be accepted since the lower Appellate Court has rightly held that the Rama who was Karta of family was alive when Hindu Succession Act came into force and as such Respondent No.1/Plaintiff had right and share in the property being daughter of pre-deceased son of Rama.

4. Second contention of the learned counsel of the Appellants is that both the Courts below have not recorded finding that property of Rama was a self-acquired property. This submission cannot be accepted since no positive assertion has been made by the Appellants herein that the said property was a self-acquired property. It is a well settled position in law that unless positive assertion is made and denied by other party, Court cannot frame an issue on the said point. Under these circumstances, there is no substantial question of law raised in the Second Appeal. Second Appeal is accordingly dismissed.

5. Learned counsel appearing on behalf of the Appellants also invited my attention to the fact that the Respondent No.1 has died during the pendency of the Appeal. Since there is no substantial question of law

raised in the Second Appeal, it is not necessary to issue notice to the Respondents for bringing heirs of Respondent No.1 on record. Second Appeal is dismissed in liminie. Since Second Appeal is dismissed, Civil Application does not survive and is disposed of accordingly.

V.M. KANADE, J.